



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

PETITION NO. 4 OF 2017

SIMION KIPSANG YATOR.....1ST APPLICANT

LUKA CHEBOTIBIN.....2ND APPLICANT

PETER C. CHEBOI.....3RD APPLICANT

JOSEPH CHELELGO.....4TH APPLICANT

JOSEPH CHERUIYOT.....5TH APPLICANT

FRANCIS SUTER.....6TH APPLICANT

JOHN CHESANG.....7TH APPLICANT

CHRISTOPHER CHEBOI.....8TH APPLICANT

=VERSUS=

JOSHUA KIPSONOJI SUMUKWO.....RESPONDENT

JUDGMENT

The petitioners herein moved to court vide a petition dated 11th April 2017 seeking for the following orders:

- a. A declaration that the petitioners are the rightful and legal owners of all parcel of land contained in Okondo community Kapluk sub-location Kabutiei location Baringo County having acquired the land through adverse possession as community land.
- b. Conservatory order, prohibiting and restraining the respondent, his servants and/or agents from entering, trespassing, selling, ploughing and/or dealing, interfering with the petitioners' quiet enjoyment of their land known as Okondo community land situated at Kapluk sub-location Kabutiei location Baringo county pending the hearing and determination of the petition herein.
- c. Eviction and vacant possession against the respondent.
- d. Special damages as per the assessment of the destroyed trees, crops and fences.
- e. Costs of this suit.

BACKGROUND

It was the petitioners' case that on or about October 2010 to 2011 the petitioners who are all representatives of 9 families living at OKONDO area - KAPLUK SUB-LOCATION WITHIN BARINGO COUNTY IN THE REPUBLIC OF KENYA were invaded by the respondent who forcefully entered their land cutting trees and burning houses while armed with bows and arrows.

That the Okondo community is composed of the 9 families named in the petition KAPCHIRCHIR, KAPSCHEMUSIAN, KAPCHELOGOI, KAPSUTER, KAPCHEMALAN, KAPCHESANG, KAPTOKOLA, KAPCHEROMIT, KAPYA/KAMUGE and the applicants/petitioners are each member representative of each a families made-up of the OKONDO COMMUNITY.

The petitioners stated that each of the families occupy an identified parcel of land which is marked by fence and planted trees along the boundaries. It was the petitioners' case that they sought assistance of police at Kabarnet Police Station and a criminal case was filed against the respondent vide KABARNET CRIMINAL CASE NO 413 OF 2012 and was convicted.

Further the petitioners' stated that the invasion by the respondent triggered a dispute between the members of the okondo community, the petitioners herein and the respondent.

The petitioners avers that the respondents conduct as complained of infringes on their constitutional rights, particularly Article 2,19,20,21,22 and 23,40 and 60 of the constitution of Kenya 2010.together with the statutory provisions as contained in the Land Adjudication Act Cap 284 of Kenya and Community Land Act.

PETITIONERS' CASE

PW1 Simeon Kipsang testified that he has authority to plead and give evidence on behalf of the petitioners. He stated that he had sued the respondent for encroaching onto the Okondo land on the upper side in 2011and produced the sketch map as pex no.2. That the respondent subdivided the suit land and gave to other people.

PW1 also stated that they reported the matter to the Area Chief who held a meeting on 19th February 2011 and asked the respondent to vacate the suit land. That the respondent demolished a house and was later arrested and charged vide Kabarnet Criminal case no. 413/12. It was PW1's further evidence that on 5th October 2015 he appeared before the National Land Commission but the respondent failed to appear whereby the NLC stated that the respondent should vacate the suit land as per the minutes produced as pex no. 8).

On cross-examination, he stated that the Okondo clan had 9 families who are not related and that demarcation of the land had not been done, but each person knows his boundary. He further stated that the respondent is on the suit land and wants him evicted. PW1 confirmed that he no longer stays on the suit land PW2 and 4 testified and reiterated the evidence of PW1 in support to the petition It was their evidence that the respondent is not part of the okondo family and therefore should be evicted from the suit land. PW3 an Executive Officer of Kabarnet PM's Court produced a copy of the register to confirm that the respondent was charged vide Kabarnet CR Case No 413 of 2012 where he was fine Khs. 4000/ for an offence of causing disturbance.

RESPONDENT'S CASE

DW1 Joshua Simokwo stated he has land in Okondo measuring 4 acres which belonged to his grandfather and has been on the suit land since 1970. He further stated that he was called for a meeting at the chief's office but was not allowed to speak.

DW1 also testified that he was charged in Kabarnet court with an offence of causing disturbance but the same was not in respect of the suit land . He further stated that he has never attended a meeting at the Commissioner's office as alleged by the petitioners.

On cross-examination he stated that he had moved to the suit land in 1970 and that he lives on the lower side and the petitioners lived on the upper side of the suit land. DW1 stated that the petitioners did not want to follow the decision of the elders which stated that the land belonged to him. That he was served with a letter to vacate the land but did not agree with it as the signature in the minutes was not his. It was his evidence that the land has not been adjudicated.

DW2 Samwel Argut corroborated the evidence of DW1 and stated that petitioners and the respondent live far from each other on the lower side and the upper side of the river. DW3 Zephania Kipngetch confirmed that the respondent moved to the suit land in 1970 which land was owned by the Kaptulion clan.

PETITIONERS' SUBMISSIONS

Counsel for the petitioners filed submissions and listed the following issues for determination:

- a. Whether the land in question is unregistered community land or otherwise,
- b. The applicable law (the Constitution, Community Land Act, Land Adjudication Act).
- c. Whether the petitioners are entitled to reliefs as enumerated in their petition.

Counsel submitted that the suit land is unregistered community land as the same has not been formally surveyed or adjudicated. That the petitioners are an organized group "The Okondo" community and falls within the description stated in under section 7 of the community Land Act for the reasons that:

- a. They have exclusive occupation of the said land known as Okondo area situated at Kapluk sub-location.
- b. They are a community organized group having one culture, practicing similar community interests as set out in article 63(1) of the constitution.
- c. That the suit land is effectively unregistered community land but the petitioners know each other's boundaries having been identified by fencing and trees planted.

Counsel urged the court to find that the suit land is community land whereby the petitioners have similar community interests. Counsel cited the case of **Republic Versus Commissioner of Lands and 4 others ex-parte Associates steel limited. High Court at Nairobi misc. Civil suits no 273 of 2007 (2014)** where the court observed:

' is not this enough evidence that the community members have similar community interest? '.

Counsel also cited the provisions of Section 5(2) e of the National Land Commission Act which mandates the Commission to manage and administer all unregistered trust and unregistered community land on behalf of the county government.

Ms Chesaro for the petitioners submitted that the National Land Commission gave a verdict vide a letter dated 18th June 2016 to the effect that the petitioners remain in their lands and the respondent to move out but the respondent failed to comply. Counsel therefore urged the court to adopt the award / verdict of the National Land Commission as judgement of the together with eviction orders

RESPONDENT'S SUBMISSION

Counsel for the respondent filed submissions and listed the following issues for determination by the court:

- a. Whether the petitioners have adversely acquired the suit land?
- b. Whether the claim has met the threshold of a petition?
- c. Whether the petitioners have exhausted the existing mechanisms for redress?
- d. Whether the petitioners have satisfied the tests for eviction?
- e. Special damages as per the assessment of the destroyed trees crops and fences.

On the first issue as to whether the petitioners have acquired the suit land by way of adverse possession, counsel submitted that it is a settled principle of law that parties must be bound by their pleadings. That the petitioners' in prayer in **Paragraph (a)** of their petition sought for a declaration to issue in favor of the applicants/petitioners awarding them all that parcel of land contained in Okondo Community Kapluk Sub-location, Baringo County having acquired the said land by adverse possession as community land cannot stand.

Counsel relied on the case of **KAHINDI NGALA MWAGANDI =VS= MTANA LEWA(2014)eKLR** where the doctrine of adverse possession was defined as

"... the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistency with the right of the owner"

Further **Section 38(1)** of the Limitation of Actions Act provides that,

*"...where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in **Section 37**, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as a proprietor of the land...".* Emphasis here is on the word "...registered...".

Mr. Mwaita Counsel for the respondent submitted that it is not in dispute that the suit land is unsurveyed and unregistered hence it is in vain to advance a claim of adverse possession on a parcel of land whose specifications have not been defined. Further that there is no title to be cancelled to be registered in the petitioners' names.

Counsel also relied on the case of **EUROPEAN COURT OF HUMAN RIGHTS (JA PYE) (OXFORD) LTD = VS= UNITED KINGDOM (2005) BHRC 705** while issuing dissenting decision of the majority, Justice Kovler stated that:

"...where there is no land survey and title to ownership is not registered in a land registry, this institution of adverse possession leading , to acquisition of title could undoubtedly be justified on the ground of avoiding uncertainty of land ownership, However when and where the land registry has been established and ownership of land can easily be ascertained through inspection of title deeds I personally have great difficulty in accepting that, adverse possession could serve and in interest "... in simple terms , this system of adverse possession looks, as if it is intended to punish a registered owner of land for not showing sufficient interest on his land".

Counsel therefore submitted that a claim of adverse possession cannot be raised or advanced on a non – existing title, unsurveyed and/or unregistered land.

Additionally counsel submitted that a prayer for an order of adverse possession can be sustained through an origination summons as clearly provided for under **Order 37** of the **Civil Procedure Rules, 2010** and not through a Constitutional Petition or a plaint as the petitioners did.

Order 37 Rule 7(2) of the **Civil Procedure Rules** provides that,

“... a party seeking to be declared as the owner of land under the doctrine of adverse possession must annex as extract of the title to his application...”.

Mr Mwaita submitted that the petitioners have not complied with this order as they have not attached the extract of the title to show that the suit property has been registered in the favour of the Respondent.

On the second issue as to whether the petition meets the threshold of a petition as required by law, counsel submitted that the petitioners have not demonstrated a valid claim capable of being protected by the law in that, they have not proved the existence of a right belonging to them and how the same right has been violated by the Respondent.

That the petitioners' claim falls short of the test required of a valid petition as established in the case of **ANARITA KARIMI NJERU VS REPUBLIC(1979) eKLR** where it was held that,

“...We would, however, again stress that if a person is seeking redress from High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”.

Counsel further submitted that the petitioners' have not exhausted the existing remedy for redress which includes the Provisions of Land Adjudication Act Cap 284 and in particular Section 30, they thought by disguising the petition in place of the plaint the same will be overlooked. That Land Adjudication Act Cap 284 has an elaborate procedure on how to solve such disputes.

On the issues as to whether the petitioners have exhausted the existing mechanisms for redress, counsel submitted that the petitioners have not shown any attempt made to the Land Adjudication Officer to verify if the land is located in an adjudication area or not. In the absence of a title, map or survey plan, then, the petitioners' are not sure that area is yet to be declared an Adjudication Section or has already been declared. It was the duty of the Petitioners' to establish and clarify on the above. Counsel urged the court to find that the petitioners have not exhausted mechanism for redress.

Counsel submitted that the petitioners have failed to establish a *prima facie* case to warrant the Respondent to be evicted as they have not proved ownership or any proprietary interest to the suit land.

On the issue of special damages as per the assessment of the destroyed trees and fences, Counsel submitted that it is trite law that, special damages must be pleaded and proved. The petitioners failed to properly plead, particularize and prove the claim for special damages hence the claim should be dismissed with costs.

ANALYSIS AND DETERMINATION

This is a petition by the petitioners seeking that the court finds that they have acquired the suit land by way of adverse possession. And eviction orders. The petitioners also seek for special damages for the trees and fences that were destroyed.

I have considered the petition the evidence and the submissions by counsel and find that the issues for determination are as follows.

- a. Whether the petition is competent as filed.
- b. Whether the petitioners are entitled to an order of adverse possession.
- c. Whether the petitioners are entitled to a prayer of special damages.

On the first issue as to whether the petitioners petition is competent, the law was settled in the Court of Appeal case of **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** and that of **ANARITA KARIMI NJERU VS ATTORNEY GENERAL Petition No. 1 of 1979 1 KLR 154** where the court held :

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

Further in the case of **Serah Mweru Muhu v Commissioner of Lands & 2 others [2014] eKLR** the court determined that;

“In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests”

The Constitution of Kenya (Protection of Rights and Procedure Rules, 2013 require in Rule 10(2) that a constitutional petition shall contain the facts relied upon; the constitutional provision violated; the nature of injury caused and the relief sought. The petitioners have not cited the provisions of the Constitution that they allege to have been violated by the respondent

A cursory glance at the petition from the heading and the reliefs sought leaves no doubt in anybody's mind that the petition is lacking the

threshold required in a petition. The petitioners have not listed the constitutional provisions that have been violated and what reliefs they seek from such violation. In fact prayer (a) of the petition seeks for an order that the petitioners have acquired the suit land by way of adverse possession. The other orders are of conservatory nature and eviction of the respondent. Further the petitioners at paragraph 12 of the petition claims that the petitioners cannot be divested of their interest in the suit property without any valid reason and to do so amounts to fundamental breach of their constitutional rights to own property.

Is failure of the petition to meet the threshold of a constitutional petition curable by the provisions of Article 159(2)(d) which provides that justice shall be administered without undue regard to procedural technicalities and the overriding objective under Section 1A and 1B of the Civil Procedure Act?

Section 1A provides that:

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

a. the just determination of the proceedings;

b. the efficient disposal of the business of the Court;

c. the efficient use of the available judicial and administrative resources;

d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

e. the use of suitable technology.

The issue of the threshold on constitutional petitions goes to the root of what is to be adjudicated upon by the court and as such non-compliance should not be wished away by applying the provisions of Article 159. I find that the failure to comply with the set down rules on constitutional petitions cannot be cured as it does not amount to a technicality. If courts were to allow this, then they would be left with guess work as to what violations have been occasioned and what remedies the petitioners should be awarded. This would further amount to the court jumping into the arena of conflict.

On this limb I find that the petition does not meet the threshold.

On the issue as to whether the petitioners are entitled to and orders of adverse possession, it is trite law as was held in the case of **Wambugu -v- Njuguna (1983) KLR 173**, where the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

The ingredients of adverse possession in Kenya has also been set out in the case of **Mbira -v- Gachuhi (2002) IEALR 137** in which the court held that:

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

In order for a claim of adverse possession to succeed, the claimant must prove the definite portion or acreage that he has dispossessed the owner of. In the case of **KIMANI RUCHINE & ANOTHER vs SWIFT RUTHERFORD CO. LTD & ANOTHER (KLR)** the court found as follows:-

“Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time.”

Further the Court of Appeal in the case of **KASUVE vs MWAANI INVESTMENTS LIMITED & OTHERS (2004)1 EA** held as follows:-

“Any person who claims to have been entitled to land by adverse possession may apply to the High Court for an order that he be registered as the proprietor of the land. The claimant must prove that he has been exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or after the discontinuation of possession by the owner of his own volition. The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession.

..... Further, the portions which the Appellant was claiming were not clearly demarcated. There was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres, hence the claim for adverse possession would fail through uncertainty.”

In the instant case it is not in dispute that the land is unsurveyed, undemarcated, unadjudicated and unregistered. The petitioners did not indicate the acreage of the land that they claim that they have acquired by adverse possession. Such identification is an integral part of proving a claim for adverse possession.

The question that we should also ask, is to whom the petitioners have acquired the land adversely from as the respondent is not the registered owner of the suit land. This makes the claim a non-starter as there is nothing for the court to adjudicate.

Having considered the issue as to whether the petitioners are entitled to an order of adverse possession which is in the negative, it follows that the claim fails on all fours. The order of eviction cannot issue in the circumstances.

Lastly on the issue of special damages, it is trite law that a claim for special damages must be specifically pleaded and proved. In the case of **Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992** it was held that

*“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of **Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297** and the latest decision of this Court on this point which appears to be **Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR)**. In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:*

*“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In **Ouma v Nairobi City Council [1976] KR 304** after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in **Ratcliffe v Evans [1892] QB 524**, an English leading case of pleading and proof of damage.*

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

I therefore find that the claim for special damages was not pleaded specifically with the details and not strictly proved. This must also fail.

The final orders are that this petition is dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE